

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,		)	
		)	
Plaintiff,		)	
		)	CIVIL ACTION NO. 04-0904 (JTE)
v.		)	
		)	
ASHLAND, INC.,		)	
		)	
Defendant.		)	
<hr/>		)	

**CONSENT DECREE**

**I. BACKGROUND**

A. The United States of America (“United States”), on behalf of the United States Army Corps of Engineers, filed a complaint in this matter against Ashland Inc. (hereinafter “Ashland”) pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended (“CERCLA”), seeking reimbursement of response costs incurred or to be incurred for response actions taken or to be taken at or in connection with the release or threatened release of hazardous substances at the Ashland 2 Site in Tonawanda, New York.

B. Ashland answered the complaint by, inter alia, denying liability and asserting a contingent counterclaim against the United States for contribution under Section 113(f) of CERCLA.

C. The United States and Ashland (hereinafter “the Parties”) have conducted extensive discovery and, after the close of discovery, negotiated in good faith towards a settlement.

D. By entering into this consent decree, Ashland does not admit any liability arising out of the transactions or occurrences alleged in the complaint or related to this consent decree, nor does the United States admit any liability on Ashland’s claims.

E. Ashland has placed in Escrow the amount specified in paragraph 5 hereof, in anticipation of the lodging, approval and entry of this Consent Decree.

F. The United States and Ashland agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

## **II. JURISDICTION**

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b) and also has personal jurisdiction over the Parties. The Parties consent to and shall not challenge entry of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

## **III. PARTIES BOUND**

2. This Consent Decree is binding upon the United States and upon Ashland and its successors and assigns. Any change in ownership or corporate or other legal status, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Ashland under this Consent Decree.

## **IV. DEFINITIONS**

3. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

- a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*
- b. "Consent Decree" shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, this Consent Decree shall control.
- c. "Corps" shall mean the United States Army Corps of Engineers and any successor departments, agencies or instrumentalities of the United States.
- d. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.
- e. "DOJ" shall mean the United States Department of Justice and any successor

departments, agencies or instrumentalities of the United States.

f. “DOE” shall mean the United States Department of Energy and any successor departments, agencies or instrumentalities of the United States.

g. “Escrow” shall mean the restricted account established by Ashland for deposit of the amount specified in Paragraph 5.

h. “FUSRAP” shall mean the Formerly Utilized Sites Remedial Action Program administered by the Department of Energy and Army Corps of Engineers.

i. “FUSRAP Waste” shall encompass, all soils, groundwater, building or other materials located at or under the Sites with radioactive contamination resulting from activities conducted by the United States or its contractors.

j. “Interest,” except in Paragraph 5, shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year. The term “interest” used in Section VI, Paragraph 5, shall mean the commercially reasonable rate earned by the restricted account established as the Escrow into which Ashland deposited the amount specified in Paragraph 5.

k. “Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

l. “Parties” shall mean the United States and Ashland Inc.

m. “Plaintiff” shall mean the United States.

n. “Section” shall mean a portion of this Consent Decree identified by a Roman numeral.

o. “Sites” shall mean the Ashland 2 site, encompassing approximately 115 acres, located at 4545 River Road in Tonawanda, New York; the Ashland 1 Site, encompassing approximately 11 acres, formerly known as the “Haist” property, located in Tonawanda, New York; the Seaway Site, located at 4825 River Road, encompassing approximately 100 acres located at in Tonawanda, New York; and the Rattlesnake Creek Site, encompassing approximately 7,600 feet located in Tonawanda, New York. These Sites are generally shown on the maps at Appendix A. The sites are “facilities” within the meaning of CERCLA Section 101 and also include such areas as may come within the definition of “facility” in that section of the statute.

p. “United States” shall mean the United States of America, including its departments, agencies and instrumentalities.

**V. STATEMENT OF PURPOSE**

4. By entering into this Consent Decree, the mutual objective of the Parties is for Ashland to make a cash payment to address its liability for the Sites as provided in the Covenant Not to Sue by Plaintiff in Section VIII, and subject to the Reservations of Rights by United States in Section IX.

**VI. PAYMENT OF RESPONSE COSTS**

5. On July 9, 2007, Ashland deposited \$2,750,000.00 into Escrow. Within 30 days of entry of this Consent Decree, Ashland shall transfer the principal amount \$2,750,000.00, plus any interest accrued from August 22, 2007, in the Escrow. Any interest accrued in the Escrow prior to August 22, 2007 shall be returned to Ashland.

6. Payment shall be made by FedWire Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice account in accordance with current EFT procedures, referencing USAO File Number \_\_\_\_\_, and DOJ Case Number 90-11-2-8292. Payment shall be made in accordance with instructions provided to Ashland by the Financial Litigation Unit of the U.S. Attorney’s Office in the Western District of New York following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. Eastern Time shall be credited on the next business day.

7. At the time of payment, Ashland shall send notice that payment has been made to the Corps and DOJ in accordance with Section XIII (Notices and Submissions).

8. The total amount to be paid pursuant to Paragraph 5 shall be forwarded the Corps and will be credited to the account used to fund response actions on eligible sites, and will be available for response action costs for any eligible site. The point of contact for payment at the Corps shall be:

William Caldwell,  
HQ USACE, CECW-IP (#3J71)  
441 G Street, NW  
Washington, DC 20314

**VII. FAILURE TO COMPLY WITH CONSENT DECREE**

9. Interest on Late Payments. If Ashland fails to make any payment under Paragraph 5 by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment in the Escrow.

10. Stipulated Penalty.

a. If any amounts due under Paragraph 5 are not paid by the required due date, Ashland shall be in violation of this Consent Decree and shall pay, as a stipulated penalty, in addition to the Interest required by Paragraph 9, \$5,000 per violation per day that such payment is tendered after the due date.

b. Stipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by the Corps. All payments to the Corps under this Paragraph shall be identified as “stipulated penalties” and shall be made by certified or cashier’s check made payable to “United States Treasury” The check, or a letter accompanying the check, shall reference the name and address of the party(ies) making payment, the Site names, and DOJ Case Number 90-11-2-8292, and shall be sent to:

United States Attorney, Western District of New York  
138 Delaware Avenue  
Buffalo, NY 14202  
(716) 843-5700

c. At the time of each payment, Ashland shall send notice that payment has been made to the Corps and DOJ in accordance with Section XIII (Notices and Submissions).

d. Penalties shall accrue as provided in this Paragraph regardless of whether the Corps has notified Ashland of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

11. If the United States brings an action to enforce this Consent Decree, Ashland shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

12. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiff by virtue of Ashland’s failure(s) to comply with the requirements of this Consent Decree.

13. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that may have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse Ashland from payment as required by Section VI or from performance of any other requirement of this Consent Decree.

**VIII. COVENANT NOT TO SUE BY PLAINTIFF**

14. Covenant Not to Sue by United States. Except as specifically provided in Section IX (Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against Ashland pursuant to Sections 106, 107(a), and 113(f) of CERCLA, 42 U.S.C. §§ 9606, 9607(a), and 9613(f), with regard to the Sites. With respect to present and future liability, this covenant not to sue shall take effect upon receipt by the Corps of all payments required by Section VI (Payment of Response Costs) and any amount due under Section VII (Failure to Comply with Consent Decree). This covenant not to sue is conditioned upon the satisfactory performance by Ashland of its obligations under this Consent Decree. This covenant not to sue extends only to Ashland and does not extend to any other person.

**IX. RESERVATION OF RIGHTS BY UNITED STATES**

15. The United States reserves, and this Consent Decree is without prejudice to, all rights against Ashland with respect to all matters not expressly included within the Covenant Not to Sue by United States in Paragraph 14. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Ashland with respect to:

- a. liability for failure of Ashland to meet a requirement of this Consent Decree;
- b. criminal liability;
- c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- d. liability, based upon Ashland's
  - (i) operation of the Sites, or
  - (ii) upon transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal, of a hazardous substance or a solid waste at or in connection with the Sites, after signature of this Consent Decree by Ashland;
- e. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant from any other site;
- f. liability for any future response actions arising from past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant which is not FUSRAP Waste.

**X. COVENANT NOT TO SUE BY ASHLAND**

16. Ashland covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Sites or this Consent Decree, including but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions related to FUSRAP Waste at the Sites, including any claim under the United States Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 or 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Sites.

Except as provided in Paragraph 18 (Waiver of Claims) and Paragraph 22 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 15 (c) - (f), but only to the extent that Ashland's claims arise from or relate to the same action or costs that the United States is seeking pursuant to the applicable reservation.

17. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

18. Ashland agrees not to assert any CERCLA claims or causes of action that it may have for costs of response to address FUSRAP Waste at the Sites, including for contribution, against any other person. This waiver shall not apply with respect to any defense, claim, or cause of action that Ashland may have against any person, subject to Paragraph 16, if any person asserts a claim or cause of action relating to the Site against Ashland.

**XI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

19. Except as provided in Paragraph 18, nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Decree may have under applicable law. Except as provided in Paragraph 18, the Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which they may have with respect to any matter, transaction, or occurrence relating in any way to the Sites against any person not a Party hereto.

20. The Parties agree, and by entering this Consent Decree this Court finds, that Ashland is entitled, as of the date of entry of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for “matters addressed” in this Consent Decree. The “matters addressed” in this Consent Decree are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Sites, by the United States or any other person relating to FUSRAP Waste. The “matters addressed” in this Consent Decree do not include those response costs or response actions as to which the United States has reserved its rights under this Consent Decree (except for claims for failure to comply with this Decree), in the event that the United States asserts rights against Ashland coming within the scope of such reservations.

21. Ashland agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree, it will notify the Corps and DOJ in writing no later than 60 days prior to the initiation of such suit or claim. Ashland also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify the Corps and DOJ in writing within 60 days of service of the complaint or claim upon it. In addition, Ashland shall notify the Corps and DOJ within 10 days of service or receipt of any Motion for Summary Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

22. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Sites, Ashland shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenants Not to Sue by the Parties set forth in Sections VIII and X.

## **XII. RETENTION OF RECORDS**

23. Until 10 years after the entry of this Consent Decree, Ashland shall preserve and retain all records now in its possession or control, or which come into its possession or control, that relate in any manner to liability of any person under CERCLA with respect to the Sites or any future response actions with respect to the Sites, regardless of any corporate retention policy to the contrary.

24. After the conclusion of the document retention period in the preceding paragraph, Ashland shall notify the Corps and DOJ at least 90 days prior to the destruction of any such records, and, upon request by the Corps or DOJ, Ashland shall deliver any such records to the Corps. Ashland may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Ashland asserts such a privilege, it shall provide Plaintiff with the following: 1) the title of the record; 2) the date of the record; 3) the



name and title of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. However, no records created or generated pursuant to the requirements of this or any other settlement with the United States shall be withheld on the grounds that they are privileged.

25. Ashland hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Sites since the filing of suit against it regarding the Sites.

### **XIII. NOTICES AND SUBMISSIONS**

26. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Party in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, Corps, DOJ, and Ashland, respectively.

#### As to the United States:

#### As to DOJ:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice (DJ # 90-11-2-08292)  
P.O. Box 7611  
Washington, D.C. 20044-7611

#### As to the Corps:

Michelle F. Barczak  
U.S. Army Corps of Engineer District, Buffalo  
District Counsel  
1776 Niagara Street  
Buffalo, NY 14207

#### As to Ashland:

John P. Krill, Jr.  
K&L Gates LLP  
17 N. Second Street, 18<sup>th</sup> Floor  
Harrisburg, Pennsylvania 17104

Joseph A. French  
Senior Counsel  
Ashland Inc.  
5200 Blazer Parkway  
Dublin, OH 43017

#### **XIV. RETENTION OF JURISDICTION**

27. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

#### **XV. INTEGRATION/APPENDIX**

28. This Consent Decree and its appendix constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. The following appendix is attached to and incorporated into this Consent Decree: Appendix A, "Description of Sites," consisting of two site maps, A-1 and A-2.

#### **XVI. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

29. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Ashland consents to the entry of this Consent Decree without further notice.

30. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

#### **XVII. SIGNATORIES/SERVICE**

31. Each undersigned representative of Ashland to this Consent Decree and the Acting Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

32. Ashland hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Ashland in writing that it no longer supports entry of the Consent Decree.

33. Ashland shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Ashland hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons.

**XVIII. FINAL JUDGMENT**

34. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between and among the United States and Ashland. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 2\_\_.

\_\_\_\_\_  
United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Ashland Inc., NO. 04-0904 (JTE), relating to the Ashland 1, Ashland 2, Seaway and Rattlesnake Creek FUSRAP Sites.

FOR THE UNITED STATES OF AMERICA

/s/ Ronald J. Tenpas

Ronald J. Tenpas  
Assistant Attorney General  
Environmental and Natural Resources Division

/s/ Susan Akers

Susan Akers  
Senior Attorney  
David Weigert  
Rachel Hankey  
Trial Attorneys  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044-7611

Date: 1/7/08

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Ashland Inc., NO. 04-0904 (JTE), relating to the Ashland 1, Ashland 2, Seaway and Rattlesnake Creek FUSRAP Sites.

FOR THE ARMY CORPS OF ENGINEERS

/s/ John S. Hurley\_\_\_\_\_

John S. Hurley  
Lieutenant Colonel, Corps of Engineers  
District Engineer

Date: 10/12/07

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Ashland Inc., NO. 04-0904 (JTE), relating to the Ashland 1, Ashland 2, Seaway and Rattlesnake Creek FUSRAP Sites.

FOR DEFENDANT ASHLAND INC.

Date: 10/10/07

/s/ David L. Hausrath

[Names and addresses of Defendant's signatories]

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Joseph A. French  
Senior Counsel  
Ashland Inc.  
5200 Blazer Parkway  
Dublin, OH 43017

John P. Krill, Jr.  
K&L Gates LLP  
17 N. Second Street, 18<sup>th</sup> Floor  
Harrisburg, Pennsylvania 17104